# Florida Insurance Report

Keeping You Informed About Florida
Volume XIII, Issue I

## 2015 Off to a Fast Start

By: Travis Miller

The beginning of a new year always produces a stark contrast, especially following an election year. The last two weeks of the calendar year tend to be fairly quiet as we all try to recharge our batteries and spend time away from the office. Immediately upon our return in the new year, however, we take off again in a dead sprint. On January 6, Governor Rick Scott was sworn in for his second term, along with fellow Republicans Jeff Atwater (CFO), Pam Bondi (Attorney General), and Adam Putnam (Commissioner of Agriculture). The reelection of these four officials means that Florida's Financial Services Commission (FSC) will remain the same. The FSC, of course, is the collegial body that oversees the Florida Office of Insurance Regulation and Office of Financial Regulation.

Less than two hours after the swearing-in ceremony, we saw our first legislative committee meeting of the year for insurance issues. The Senate Banking and Insurance Committee held its first meeting of the year with an agenda that included a presentation from the Office of Insurance Regulation. The next day, the House of Representatives took its turn when its insurance committee heard presentations from Citizens Property Insurance Corporation and the Florida Hurricane Catastrophe Fund. Committee meetings will continue over the next two months in advance of the legislative session. The 2015 session begins March 3.

## Potential Private Market Risk Transfer for CAT Fund

By: Ted Prekop

The Florida Hurricane Catastrophe Fund ("CAT Fund") may be poised to engage in a reinsurance risk transfer this year. If approved, it will be the first such risk transfer for the CAT Fund. In a January 7, 2015 meeting before the Florida House Insurance & Banking Subcommittee, Jack Nicholson, CAT Fund Chief Operating Officer, told the subcommittee that he intends to recommend the transfer to Governor Rick Scott, Chief Financial Officer Jeff Atwater, and Attorney General Pam Bondi. Nicholson tried to push a similar proposal last year, which would have allowed for the purchase of $1.5 billion in private reinsurance and catastrophe bonds, but was unable to garner the necessary support.

Inside this Issue



## The Terrorism Risk Insurance Act Reauthorized by Congress

By: Karen Asher-Cohen

The reauthorization of the Terrorism Risk Insurance Act (TRIA) was signed into law on January 12th by President Obama, after the House and Senate passed the Terrorism Risk Insurance Program Reauthorization Act of 2015. TRIA was first signed into law in 2002, and later extended in 2005 and again in 2007, but was allowed to expire on December 31, 2014. The newly reauthorized program is extended for six years, until December 31, 2020.

Under the law, an act of terrorism must be certified by the Secretary of the Treasury, in consultation with the Secretary of Homeland Security and the United States Attorney General. The new law contains some changes, including:

- The current trigger for aggregate industry insured losses will increase from $100 million to $200 million, increasing by $20 million per calendar year;
- The federal share of losses will decrease from 85% to 80%, decreasing by 1% per year;
- The current $27.5 billion insurance industry aggregate retention amount will increase to $37.5 billion, increasing by $2 billion per year; and
- Requires the Secretary of the Treasury to issue a certification timeline to Congress.

The NAIC has created a Working Group to prepare a model bulletin and streamlined procedures for the approval of insurance coverage policy forms related to acts of terrorism.

## OIR Issues Personal Injury Protection Insurance Data Call Report

By: Karen Asher-Cohen

The OIR released its Report on the review of the Personal Injury Protection (PIP) insurance data call, as required by HB 119, which was passed by the Florida Legislature in 2012. The Report provides data which shows the impact on the insurance market from the reforms passed in this law. Per the Report, the data reflects a general decrease in the frequency and severity of claims for PIP since January 1, 2013, the implementation date of HB 119, with South Florida and the Tampa/St. Petersburg areas experiencing the greatest decreases.

The law required the data call to include the following issues:

- Quantity of personal injury protection claims
- Type or nature of claimants
- Attorney fees related to initiating and defending actions for PIP benefits
- Type and quantity of medical benefits
- Amount and type of PIP benefits paid and expenses incurred
- Licensed drivers and accidents; and
- Fraud and enforcement.

The Report also included a summary of rate filings for the top 25 insurers in Florida, which represented 80.9% of the total personal automobile insurance market in Florida, on or after January 1, 2011.

# Chipping Away at the *Barbetta* Rule - The Eleventh Circuit Determines that Ship-Owners May be Liable for the Negligence of their Medical Staff under Theories of Agency Law

By: Laura Dennis

On November 10, 2014, the Eleventh Circuit Court of Appeals in *Franza v. Royal Caribbean Cruises, Ltd.,* -- F.3d --, 2014 WL 5802293 (11th Cir. 2014), declined to apply the long-recognized rule espoused in *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364 (5th Cir. 1988), also known as the *Barbetta* rule, to a claim involving medical negligence. Under the *Barbetta* rule, a ship-owner is immunized from vicarious liability whenever a ship's employees render negligent medical care to its passengers. Rejecting the bases that supported the court's decision in *Barbetta,* the Eleventh Circuit determined that the application of vicarious liability in these circumstances should not be subject to such bright-line rules, but instead requires a fact-specific inquiry.

The case presented to the Eleventh Circuit stems from an injury suffered by a passenger on one of Royal Caribbean's cruise ships. While in port, the passenger fell and hit his head. The passenger sought treatment from the ship's medical staff, but allegedly received negligent care. Specifically, the ship's nurse allegedly failed to conduct diagnostic scans or assess any cranial trauma and told the passenger he was fine to return to his cabin. Later, the passenger was evaluated by the ship's physician who ordered the passenger to be transferred to a hospital for treatment. However, by the time the passenger reached the hospital, his life was beyond saving, and the passenger passed away one week later. Thereafter, the passenger's daughter sued Royal Caribbean, seeking to hold the cruise line liable for the purported negligence of the ship's doctor and nurse under the theories of actual and apparent agency.

Relying on the *Barbetta* rule, the district court dismissed the plaintiff's complaint. However, the Eleventh Circuit reversed the district court's holding, recognizing that absent any statutory mandate to the contrary, the existence of an agency relationship is a question of fact under general maritime law, and whether the principal has control over its agents is the essential element. The court in *Franza* declined to apply the *Barbetta* rule, noting that it could no longer discern a basis in law for ignoring the facts of individual medical malpractice complaints and discarding the rules of agency. In particular, the court pointed to changes in the cruise industry and evolving modern technology, which have led to state-of-the-art cruise ships that serve as floating cities with modern infirmaries and urgent care centers. Ultimately, the Eleventh Circuit found that the reasoning applied by the court in *Barbetta* was not sufficient to justify a broad grant of immunity from vicarious liability in all claims of medical malpractice.

Turning to the allegations of the plaintiff's complaint, the Eleventh Circuit determined that the facts, as alleged, were sufficient to establish the existence of an agency relationship. In particular, the plaintiff alleged that the medical facility was created, owned, and operated by Royal Caribbean, the medical personnel wore uniforms bearing Royal Caribbean's name and logo, and Royal Caribbean paid to stock the medical centers. Additionally, the plaintiff alleged that Royal Caribbean promoted its medical staff and represented them as employees, that Royal Caribbean billed passengers directly for onboard medical services, and that the medical staff were considered to be part of the ship's crew. Finding the allegations in the complaint sufficient to state a claim, the Eleventh Circuit reversed the dismissal of the plaintiff's complaint and remanded the action.

# Third DCA Rules that Tolling Provision of Medical Malpractice Notice Rule Applies to All Potential Defendants

By: Ted Prekop

In *Salazar v. Coello*, 2014 WL 7156859 (Fla. 3d DCA 2014), the Third District Court of Appeal ("Third DCA") recently ruled that the 90 day statute of limitations tolling provision in Florida's medical malpractice law applies to *all* potential defendants once a Notice of Intent to Initiate Litigation is sent to a *single* defendant.

Section 766.106(2), Florida Statutes, requires that a medical malpractice plaintiff must provide a "prospective defendant" with 90 days notice prior to initiating litigation. This 90 day period gives the prospective defendant and the medical malpractice insurer time to properly determine potential liability. Section 766.106(4), Florida Statutes, also provides that the statute of limitations is tolled as to "all potential defendants" during this 90-day period.

The suit arose when Aracely Salazar ("Plaintiff") was severely injured during a surgical procedure performed on August 22, 2007 involving Dr. Martin Moliver, Opal Hew, and Kendall Anesthesia Associates (collectively, the "Defendants"). On August 10, 2009, twelve days before the two-year statute of limitations would have run, Plaintiff obtained a ninety-day extension of the statute of limitations pursuant to section 766.104(2), Florida Statutes. With the extension, Plaintiff had until November 20, 2009 to file suit.

On October 21, 2009, Plaintiff sent a Notice of Intent to Initiate Litigation ("Notice(s) of Intent") to the surgeon who performed the surgery and the hospital where the surgery was performed. However, Plaintiff did not send Notices of Intent to the Defendants until February 12, 2010, and the Defendants did not receive the Notices until February 16, 2014.

At trial, the Defendants argued that because Plaintiff did not send Notices of Intent to them prior to November 20, 2009, Plaintiff's suit was barred by the statute of limitations. The trial court agreed with the Defendants, which led to an appeal by Plaintiff.

On appeal, the Third DCA reversed the trial court and held that the statute of limitations on Plaintiff's claims as to *any* defendant was tolled for 90 days by virtue of section 766.106(4). The Third DCA based its ruling on several grounds. First, it noted that the legislative intent of Florida's medical malpractice scheme is to prevent frivolous claims and ensure claimants full access to the courts. Second, the Third DCA found that the terms "prospective" and "potential" had been used synonymously in Chapter 766, Florida Statutes, since it was enacted in 1985.

The Third DCA also cited with approval to two Fifth District Court of Appeal cases, *Burbank v. Kero*, 813 So. 2d 292 (Fla. 5th DCA 2002) and *CORA Health Services v. Steinbronn*, 867 So. 2d 587 (Fla. 5th DCA 2004), which both held that a Notice of Intent received by one defendant tolls the statute of limitations as to all defendants for 90 days. The Defendants attempted to distinguish their case from *Burbank* on the grounds that the claimant in *Burbank* was unaware of the defendant physician's involvement in the suit, whereas in the instant case Salazar had knowledge of the Defendants' involvement in the lawsuit. The Third DCA rejected this argument, stating that this would lead to a multitude of hearings in every case

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### Third DCA Rules - Continued

based on the issue of a claimant's knowledge. The Third DCA also noted that there are legitimate reasons for sending out Notices of Intent at different times, such as cases in which a claimant does not "receive corroborative opinions from medical experts for all claims at the same time."

The Third DCA also considered a hypothetical situation proposed by the Defendants involving ten different, known but unrelated defendants. The Third DCA conceded that it is possible that a claimant could extend the statute of limitations nine separate times under its reading of section 766.106(4), but dismissed the possibility as remote and not rising to the level that would justify reading language that does not exist into the statute. Finally, the Third DCA also emphasized that the Notices of Intent are still subject to the four-year statute of limitations period for negligence claims found in section 95.11, Florida Statutes.

## Office of Insurance Regulation Report Finds Competitive Workers' Compensation Market

By: Travis Miller

The Office of Insurance Regulation has released its 2014 annual report on the state of the Florida workers' compensation insurance market. The report concludes that the market currently is competitive, well-capitalized, and robust. The report points out that six of the 10 largest workers' compensation insurers in Florida are Florida-domiciled, up from four in the 2013 market report. These insurers make up about 28% of the workers' compensation premiums written in Florida.

The competitiveness of the Florida market is evidenced by 95% of the state's workers' compensation premiums being written in private market insurers. Among the six largest states in the country, Florida is one of only two that are not heavily reliant on the state-created residual market. The OIR noted that the market is served by a large number of independent insurers, none of which have sufficient market share to exercise price control. In addition, the OIR finds there are no significant barriers to market entry and exit.

Underwriting performance in Florida also has been sound, coming in second only to Texas among the six largest states. The large states showed the following combined direct loss and DCC ratios:

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| Texas | 52.12% |
| Florida | 57.10% |
| Illinois | 67.26% |
| Pennsylvania | 70.43% |
| New York | 78.93% |
| California | 82.29% |

Meanwhile, since the Florida legislature enacted reforms in 2003, rates have fallen considerably. Florida had the highest rates in the country when the reforms were enacted, but now ranks in the middle (28th). The Office of Insurance Regulation cautions, however, that several key cases making their way through the courts could adversely affect the workers' compensation market by eroding certain aspects of the workers' compensation laws. These cases are summarized in the companion article on workers' compensation cases to watch in 2015.

# 2015 Insurance Legislative Preview

By: Ted Prekop

With the 2015 legislative session rapidly approaching, there are a number of filed bills in both houses of the legislature that insurers should be aware of. The following is a summary of some of the most important insurance related legislation that we will see this coming March.

### HB 165 – Property and Casualty Insurance (Santiago – R)

HB 165 is currently the largest insurance related bill pending in the House. It would require the Office of Insurance Regulation to use certain models when estimating hurricane losses when determining whether rates in a rate filing are excessive, inadequate, or unfairly discriminatory. It would also increase the length of time an insurer has to adhere to certain findings relating to rates made by the Commission on Hurricane Loss Projection Methodology.

The bill also would increase and decrease the amount of notice required for nonrenewal, cancellation, or termination of certain types of insurance policies. Furthermore, it would prevent the cancellation of certain insurance policies based on certain credit information.

The bill contains a number of provisions relating to motor vehicle insurance. It would revise the preinsurance inspection requirements for private passenger motor vehicles. Additionally, it would change some of the provisions relating to the making of rates for motor vehicle insurance.

Finally, the bill would allow policyholders of personal lines insurance to affirmatively elect delivery of policy documents by electronic means.

As of January 16, 2015, this bill is in the Insurance & Banking Subcommittee, which is chaired by Representative Wood – R. A similar (but not identical) bill, SB 258, sponsored by Senator Brandes – R, is also pending before the Senate.

### HB 233 – Insurance (Santiago – R)

HB 233 provides that the absence of a countersignature in an insurance policy does not affect the validity of an insurance policy. The bill also specifies that it is remedial in nature, is intended to clarify existing law, and applies retroactively.

A similar bill, SB 252, sponsored by Senator Smith – D, is pending before the Senate. As of January 16, 2015, this bill has not yet been referred to any legislative committees or subcommittees.

### HB 4011 – Motor Vehicle Insurance (Goodson – R)

HB 4011 would remove the four vehicle exclusion from the definition of the term "motor vehicle insurance" in section 624.041, Florida Statutes. The bill is currently in the Insurance & Banking Subcommittee. A similar bill, SB 234, sponsored by Senator Montford – D, is pending before the Senate.

### HB 189 – Insurance Guaranty Associations (Cummings – R)

HB 189 would revise the definition of the term "asset" in section 625.012, Florida Statutes, to include Florida Insurance Guaranty Association assessments for purposes of

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## 2015 Legislative Preview - Continued

determining the financial condition of an insurer. As of January 16, 2015, this bill is in the Insurance and Banking Subcommittee. It does not have a Senate companion bill.

**HB 221 – Long-Term Care Insurance (Drake – R)**
HB 211 would provide an additional form of mandatory offer of nonforfeiture of benefits in a long-term care insurance policy. As of January 16, 2015, this bill does not have a Senate companion bill, nor has it been referred to any committees or subcommittees.

**SB 354 – Windstorm Insurance Coverage (Bullard – D)**
SB 354 would amend section 627.712, Florida Statutes, by deleting the requirement that a mortgageholder or lienholder must approve a policyholder's decision to exclude windstorm or hurricane coverage from a property insurance policy. As of January 16, 2015, this bill does not have a House companion bill, nor has it been referred to any committees or subcommittees.

We will be monitoring insurance related bills as they are filed and posting them on our website under the Legislative Updates Tab. In addition, at the end of session we will publish our Legislative Edition of the Florida Insurance Report. Stay tuned.

## Travis Miller Recertified by the Florida Bar

RTYC Release

Travis Miller has been recertified by the Florida Bar as a Board Certified Specialist in State & Federal Government and Administrative Practice. Travis first became board certified in 2009, and certified lawyers must go through a recertification process every five years.

Certification is the highest level of evaluation by the Florida Bar relating to a lawyer's competency and experience within an area of law and the lawyer's professionalism and ethics in practice. Only 7% of eligible members of the Florida Bar members are board certified. Fewer than 90 lawyers are board certified as specialists in State & Federal Government and Administrative Practice.

The initial certification process requires the applicant to successfully pass an examination and to have substantial experience in the designated field as evidenced in an extensive application seeking information about matters the applicant has handled. The application process also includes a peer review process. In the State & Federal Government and Administrative Practice area, the peer review process includes evaluations not only by other lawyer with knowledge of the applicant's experience but also evaluations by heads of state agencies or administrative law judges who can comment on the applicant's skills and ethics. Board certified lawyers also are subject to increased continuing education requirements. At five-year intervals, board certified lawyers must demonstrate anew their experience in the field and again must go through the peer review process by fellow lawyers and agency heads or administrative law judges.

## Citizens Policies Remain Available up to $1 Million in Miami-Dade and Monroe

By: Travis Miller

The Office of Insurance Regulation has determined there is not a "reasonable degree of competition" in Miami-Dade and Monroe Counties for homeowners with dwelling limits exceeding $900,000 or for condominium unit owners with combined dwelling and contents limits over $900,000. As a result, Citizens Property Insurance Corporation will continue to make coverage available to these policyholders in Miami-Dade and Monroe Counties.

In accordance with Section 627.351(6)(a)3., as of January 1, 2014, Citizens stopped writing homeowners policies with Coverage A limits exceeding $1 million and condominium unit owners policies with combined Coverage A and Coverage C limits exceeding $1 million. The statute further provided that the maximum limits were reduced to $900,000 as of January 1, 2015. They will be further reduced to $800,000 as of January 1, 2016, and to $700,000 as of January 1, 2017. However, there is an exception for policies located in areas where the Office of Insurance Regulation determines that a reasonable degree of competition does not exist. In those areas, Citizens must continue to make coverage available, up to the $1 million limit.

In anticipation of the January 1, 2015, effective date for the reduction to $900,000, the OIR considered whether a reasonable degree of competition exists for homes and condo units that would be insured for at least $900,000 but less than $1 million. The OIR found that Citizens insures almost 97% of such policies in Monroe County and more than 60% of such policies in Miami-Dade County. As a result, the OIR found that the private market is not sufficiently competitive in those areas to warrant ending the coverage option in Citizens.

## Workshop to be Held on Reimbursement Manuals

By: David Yon

The Division of Worker's Compensation of the Department of Financial Services has announced that a three member panel will consider adopting the 2015 edition of the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Rule 69L-7.020, F.A.C.) and the Florida Workers' Compensation Ambulatory Surgical Center Reimbursement Manual (Rule 69L-7.100, F.A.C.). The current versions of rules 69L-7.020 and 69L-7.100, F.A.C., utilize the 2008 edition of the Health Care Provider Reimbursement Manual and the 2011 edition of the Ambulatory Surgical Center Reimbursement Manuals, respectively. The manuals establish the reimbursement policies, guidelines, codes, and maximum reimbursement allowances for services and supplies provided by health care providers and ambulatory surgical centers. The three member panel will also review and issue the 2015 Biennial Report to the President of the Florida Senate and the Speaker of the Florida House of Representatives. The panel workshop regarding the manuals and the Biennial Report is scheduled for Thursday, January 22, 2015, 9:00 a.m. in Room 116, Larson Building, 200 East Gaines Street, Tallahassee, Florida. Copies of the 2015 manuals are available at www.myfloridacfo.com.

## Key Workers' Compensation Cases Working Through Courts

By: Travis Miller

The workers' compensation market received favorable news in late 2014 when the Florida Supreme Court in *Morales v. Zenith Insurance Company* answered certified questions from the 11th Circuit Court of Appeal in a manner that upholds the workers' compensation system as the exclusive remedy for workplace injuries. We have previously summarized *Morales* in prior editions of the Florida Insurance Report. To briefly recap, the case involved an insurer that entered into a settlement agreement and fully paid workers' compensation benefits for a workplace injury attributable to ordinary negligence. The estate for the deceased worker separately pursued a tort claim and obtained a default judgment against the employer, which it then sought to enforce against the insurer. The Supreme Court found, however, that the settlement agreement should be honored and the estate should not prevail on the separate negligence claim.

In 2015, the workers' compensation industry will be watching at least three additional important cases. Florida's First District Court of Appeal declared the statutory attorneys' fee formula unconstitutional in *Castellanos v. Next Door Company*. The court then certified the question to the Florida Supreme Court, which held oral argument in the case in November, 2014.

In *Cortes v. Velda Farms, LLC*, a circuit judge declared the exclusive remedy provisions of the workers' compensation law to be unconstitutional. The judge found the law to be unconstitutional because it does not provide an adequate remedy to justify injured workers' giving up their right to sue under tort theories. The case was appealed to the Third District Court of Appeal in August, 2014. In October, 2014, the Third District refused to certify the question to the Supreme Court as a matter requiring immediate resolution.

Finally, in *Westphal v. City of St. Petersburg*, a three-member panel of the First District Court of Appeal declared the 104-week cap on temporary total disability benefits to be unconstitutional. However, the decision was withdrawn following a rehearing en banc. The First District has certified the question to the Florida Supreme Court, which held oral argument in June, 2014.

## Be Green - Save a Tree

The Radey Law Firm is committed to being green. Our Florida Insurance Report is available in an electronic version. If you are interested in receiving your future issues by e-mail please contact Kendria Ellis at kellis@radeylaw.com and let us know.

## Second DCA Certifies Sinkhole Question to Florida Supreme Court

By: Ted Prekop

In *Florida Insurance Guarantee Association v. de la Fuente*, 2015 WL 72273 (Fla. 2d DCA 2015), the Second District Court of Appeal ("Second DCA") ruled that the statutory definition of "covered claim" in effect on the date an insurer is adjudicated insolvent governs the extent of the Florida Insurance Guarantee Association's ("FIGA") liability on sinkhole claims.

On May 7, 2009, the Plaintiffs purchased a one-year homeowners' insurance policy with sinkhole coverage from HomeWise Preferred Insurance Company ("HomeWise"). On March 1, 2010, the Plaintiffs reported a sinkhole loss to HomeWise. HomeWise denied the Plaintiffs' claim and as a result the Plaintiffs brought suit. On September 2, 2011, while the lawsuit was pending, HomeWise was declared insolvent, and as a result, FIGA was activated to handle "covered claims" of HomeWise. FIGA offered to issue payment for repairs, but the Plaintiffs refused and demanded appraisal. The trial court granted appraisal, leading FIGA to appeal.

The Second DCA began its analysis by examining the two versions of "covered claim" in section 631.54, Fla. Stat. Prior to May 17, 2011, the definition of "covered claim" allowed FIGA to pay insureds directly for a sinkhole loss. However, after May 17, 2011, section 631.54 had been amended to provide that FIGA may only pay a contractor, and not an insured, for the "actual repairs to the property." The Second DCA concluded that the definition of "covered claim" in effect on the date HomeWise was adjudicated insolvent controlled. Additionally, the Second DCA also determined that the trial court should not have ordered FIGA to participate in the appraisal process at all.

Anticipating potential disagreement between Florida's appellate courts on these issues, the Second DCA asked the Florida Supreme Court to answer the following questions: (1) which definition of "covered claim" should be utilized in sinkhole coverage cases involving insolvent insurers, and (2) whether FIGA's obligation to pay only for "actual repairs" precludes an insured from obtaining an appraisal award.

## OIR Proposes Rules on Credit for Reinsurance

By: Travis Miller

The Office of Insurance Regulation has followed up on a 2014 rule development workshop by now proposing two rules related to credit for reinsurance. Proposed rule 69O-144.005 "Credit for Reinsurance" and proposed rule 69O-144.007 "Credit for Reinsurance from Certified Reinsurers" will provide guidance to reinsurers seeking to maintain reduced collateral and to domestic ceding insurers. If an interested party requests a hearing on the rules, the OIR will hold the hearing on February 18 in Tallahassee.

The rules would use the term "certified reinsurer" instead of "eligible reinsurer" under existing regulations. The rules would require a domestic ceding insurer to notify the OIR when its reinsurance recoverables from a single reinsurer or affiliated group of reinsurers exceed, or are likely to exceed, 50% of reported surplus. In addition, a domestic ceding insurer would be required to notify the OIR when it cedes, or is likely to cede, to any single reinsurer or affiliated group of reinsurers more than 20% of its gross written premiums.

The proposed rules also outline the amount of collateral that certified reinsurers must maintain in order for ceding insurers to take 100% credit for the reinsurance. The rules set forth a sliding scale that requires reinsurers to post less

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### Reinsurance - Continued

collateral as their financial strength ratings become higher. The financial strength ratings must be obtained from at least two of five listed rating agencies. When the rulemaking process is complete, the OIR's goal is to post the ratings on its website so ceding insurers will be able to readily determine the collateral requirements associated with any certified reinsurers they use.

## Trial Courts Must Follow Three-Step Inquiry When Faced With Discovery Requests Involving Trade Secrets

By: Laura Dennis

The Third District Court of Appeal, in *Sea Coast Fire, Inc. v. Triangle Fire, Inc.,* -- So. 3d --, 2014 WL 6679018 (Fla. 3d DCA 2014), recently outlined the process that trial courts must follow when addressing discovery disputes involving alleged trade secrets. In *Sea Coast Fire, Inc.,* a fire equipment provider and service company brought suit against a former employee and a rival fire equipment service company which subsequently hired the former employee. The plaintiff company sought discovery from the rival company, including the rival company's customer lists, customer contact information, and pricing information. The rival company objected and filed a motion for protective order. Without conducting an in camera inspection, the trial court ordered the production of the discovery.

Emphasizing that the "disclosure of trade secrets can cause irreparable harm," the Third District Court of Appeal held that the trial court departed from the essential requirements of the law by ordering the production without first determining whether the requested documents constituted trade secrets. The court in *Sea Coast Fire, Inc.* then outlined the three-step inquiry trial courts must follow in such circumstances. First, the trial court must "determine whether the requested production constitutes a trade secret." In doing so, the court may perform an in camera inspection, document examination, or hold an evidentiary hearing. Second, if the requested production constitutes trade secret, then the trial court must "determine whether there is a reasonable necessity for the production." The party seeking the discovery bears the burden of establishing reasonable necessity. Lastly, if the production is ordered, the trial court is required to set forth its findings. The Third District Court of Appeal added that if the trial court orders disclosure, it should take measures to limit any potential harm that may be caused by the production.

## Intellectual Property Problems? Call Radey

Whether it be patents, copyrights, trademarks, or trade secrets, today's businesses are encountering more and more intellectual property issues. These issues can often be complex and technical, requiring specialized expertise. One of our attorneys, Ted Prekop, is a registered patent attorney and practices in intellectual property matters. Two of our shareholders, Travis Miller and Tom Crabb, also have experience in registering service marks for insurance companies and other insurance interests. If you have any questions concerning an intellectual property matter, contact our office at (850) 425-6654.

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